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No. 02-1317

# In the Supreme Court of the United States

JAMES R. COOK, PETITIONER

*v.*

ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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1H PR

## QUESTION PRESENTED

Whether an otherwise final decision by the Department of Veterans Affairs denying a claim for benefits may be reopened on the ground that the Department committed a "grave procedural error" in adjudicating the claim.

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### OPINIONS BELOW

The en banc decision of the court of appeals (Pet. App. 1-50) is reported at 318 F.3d 1334. The panel decision of the court of appeals, withdrawn by the en banc court in a decision reported at 275 F.3d 1365, is reported at 258 F.3d 1311. The decision of the United States Court of Appeals for Veterans Claims (Pet. Supp. App. 1-12) is unreported.

### JURISDICTION

The judgment of the en banc court of appeals was entered on December 20, 2002. A second petition for rehearing was denied on February 3, 2003. Pet. App. 51-52. The petition for a writ of certiorari was filed on

February 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. A person seeking veterans benefits must file a claim with a regional office (RO) of the Department of Veterans Affairs (VA), formerly known as the Veterans Administration. 38 U.S.C. 5101(a); 38 C.F.R. 3.100(a). The VA is required to make reasonable efforts to help obtain the evidence necessary to substantiate a veteran's claim, including a medical opinion or medical examination if necessary to decide the claim. 38 U.S.C. 5103A(a) and (d). A decision of an RO may be appealed to the Board of Veterans' Appeals (BVA). 38 U.S.C. 7104(a).

RO or BVA decisions that deny claims for benefits are final in the absence of a timely appeal. 38 U.S.C. 511, 7103(a). Final decisions may be reopened, however, to the extent provided by statute or regulation. See 38 U.S.C. 7104(b), 7105(c). There are two statutory grounds for reopening final decisions: the discovery of "new and material evidence," 38 U.S.C. 5108, and "clear and unmistakable error" in the decision of an RO or the BVA, 38 U.S.C. 5109A(a), 7111. A veteran who establishes clear and unmistakable error is entitled to benefits retroactive to the date of his original claim. 38 U.S.C. 5109A(b).

2. In 1952, petitioner submitted a benefits claim to an RO, in which he asserted that he suffered from a "[n]ervous [s]tomach" related to his military service. Pet. App. 28. Physical and neuropsychiatric examinations revealed a duodenal ulcer with a "psychic or emotional component." *Ibid.* The RO denied the claim on the ground that petitioner's condition was not con-

nected to his military service. *Ibid.* Petitioner did not appeal. *Id.* at 29.

In July 1989, petitioner sought to reopen his 1952 claim. Pet. App. 29. The BVA did so and denied the claim, but the United States Court of Appeals for Veterans Claims (Veterans Court) reversed and directed the BVA to determine petitioner's disability rating (*i.e.*, the percentage of disability). *Ibid.* The RO subsequently awarded benefits to petitioner effective July 1989, the date on which he sought to reopen his claim. *Ibid.*

Petitioner appealed the RO's decision, contending that the effective date for benefits should have been 1952, the date of his original claim. Pet. App. 29. In his appeal to the BVA, petitioner argued that the VA had failed to provide him with a certain medical examination in connection with his original application, that the 1952 decision was therefore based on clear and unmistakable error, and that it was for that reason not final. *Id.* at 29-30. The BVA rejected petitioner's claim. *Id.* at 29.

3. The Veterans Court affirmed the decision of the BVA. Pet. Supp. App. 1-12. It held that the asserted failure of the VA to provide the assistance in question in 1952 did not constitute clear and unmistakable error. *Id.* at 4-9. It also rejected petitioner's argument that the asserted failure to assist constituted a "grave procedural error," an exception to finality recognized by the Federal Circuit in *Hayre* v. *West*, 188 F.3d 1327 (1999). Pet. Supp. App. 9-11.

4. A divided panel of the Federal Circuit affirmed the decision of the Veterans Court. 258 F.3d 1311. Interpreting *Hayre* narrowly, the panel majority held that the exception to finality created in that case did not apply to the asserted violation of the VA's duty to

assist in this case. *Id.* at 1313-1315. The dissenting judge would have found *Hayre* applicable to petitioner's case. *Id.* at 1316-1317 (Mayer, C.J., dissenting).

5. The court of appeals granted petitioner's request for rehearing en banc; vacated the panel's decision; and directed the parties to submit supplemental briefs addressing (1) whether *Hayre* should be overruled insofar as it held that the existence of a "grave procedural error" renders an otherwise final decision non-final and (2) whether, if *Hayre* is overruled, a failure by the VA to assist the veteran under then-applicable law can constitute clear and unmistakable error. 275 F.3d 1365, 1366 (2002). A divided en banc court answered these questions by (1) overruling *Hayre*'s "grave procedural error" exception to finality and (2) holding that a failure by the VA to assist the veteran cannot be clear and unmistakable error. Pet. App. 4. In answering the first question, the court applied "the familiar canon of *expressio unius est exclusio alterius*" and concluded that "Congress did not intend to allow exceptions to the rule of finality in addition to the two that it expressly created." *Id.* at 10. In answering the second question, the court held that clear and unmistakable error must be "outcome determinative" and "based on the record that existed at the time of the original decision," and that those requirements make it impossible for a breach of the duty to assist to form the basis for a claim of clear and unmistakable error. *Id.* at 25. The en banc court therefore affirmed the decision of the Veterans Court. *Id.* at 30.

Judge Dyk joined the opinion of the court but filed a concurring opinion, which was joined by Judge Linn. The concurrence noted a question not decided by the court: whether, despite the fact that retroactive relief is ordinarily not available when a proceeding is reopened

based on the discovery of new and material evidence, a breach of the VA's duty to assist might justify the award of such relief. Pet. App. 31-33.

Judge Gajarsa, joined by Chief Judge Mayer and Judge Newman, dissented. In his view, enforcing the rule of finality when the VA has breached its duty to assist would be a violation of the claimaint's due process rights. Pet. App. 33-50.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The en banc court of appeals correctly held (Pet. App. 4-15) that a judicially created "grave procedural error" exception to finality would be inconsistent with general principles of finality and the specific statutory scheme that governs finality of VA decisions.

a. This Court has recognized that basic principles of finality and res judicata apply to unappealed agency decisions. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107 (1991) (quoting *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)). In the VA context, these principles apply with full force to unappealed decisions of ROs and the BVA. See *Routen* v. *West*, 142 F.3d 1434, 1437 (Fed. Cir.), cert. denied, 525 U.S. 962 (1998).

Congress has explicitly identified two, and only two, grounds for reopening a final VA benefit decision: a showing of clear and unmistakable error in a prior

decision, 38 U.S.C. 5109A, 7111, and the discovery of new and material evidence, 38 U.S.C. 5108. As the en banc court correctly held (Pet. App. 10), these statutory provisions demonstrate that "Congress knew how to create exceptions to the finality of VA decisions" when it wished to. The en banc court was also correct in its conclusion (*id.* at 9-10) that there is nothing in the legislative history of these provisions, or of the provisions concerning the VA's duty to assist, to suggest that Congress intended to contravene the principle that decisions are final except as expressly provided by statute. A third, judicially created, exception to finality would be inconsistent with the statutory scheme.

The Veterans Court decisions on which the Federal Circuit panel relied in *Hayre*, see *Tablazon* v. *Brown*, 8 Vet. App. 359 (1995); *Hauck* v. *Brown*, 6 Vet. App. 518 (1994); *Kuo* v. *Derwinski*, 2 Vet. App. 662 (1992); *Ashley* v. *Derwinski*, 2 Vet. App. 307 (1992), do not support its conclusion that there is a non-statutory basis for reopening otherwise final decisions. As the en banc court explained (Pet. App. 13-14), each of those cases held only that "the time for appealing * * * [a] decision did not run" when the VA failed to provide the veteran with a statement of the case (see 38 U.S.C. 7105(d)(1)) or otherwise failed to comply with some requirement of VA appellate procedure.

b. Citing *Sims* v. *Apfel*, 530 U.S. 103 (2000), petitioner contends (Pet. 3-7) that traditional principles of finality should not apply to the "non-adversarial" system of adjudicating veterans-benefits claims. In *Sims*, this Court declined to impose a requirement of "issue exhaustion" in the adjudication of Social Security claims where there was no statute or regulation that did so. 530 U.S. at 106-110. Petitioner's contention is that the courts *should* create a rule of administrative proce-

dure—an exception to finality based on "grave procedural error"—that cannot be found in any statute or regulation. *Sims* stands as an obstacle to, not support for, such common law augmentation of statutory procedures.

Citing a VA regulation based on 38 U.S.C. 7104(a), which provides for the appeal of RO decisions to the BVA, petitioner also contends (Pet. 7-8) that the en banc court erred in its conclusion that there are only two statutory exceptions to finality. The regulation on which petitioner relies, 38 C.F.R. 20.904, provides that a decision may be vacated by the BVA "at any time," *ibid.*, when benefits have been allowed based on false or fraudulent evidence, 38 C.F.R. 20.904(b), or there has been a denial of due process, which includes a denial of the right of representation, a failure to provide a statement or supplemental statement of the case, and a prejudicial failure to afford a hearing, 38 C.F.R. 20.904(a). Regardless of whether this regulation can be viewed as creating additional exceptions to the rule of finality, it does not support the existence of the exception at issue here, because the regulation lists the grounds on which a decision may be vacated and "grave procedural error" is not one of them.

2. The en banc court of appeals was also correct in holding (Pet. App. 16-27) that the VA's failure to assist a claimant during the factual development of his claim cannot be a basis for a later claim of clear and unmistakable error.

Under the relevant case law, clear and unmistakable error must have been "outcome determinative" and "based upon the evidence of record at the time of the original decision." Pet. App. 21. These principles are wholly consistent with congressional intent.

The first requirement—that the error be outcome-determinative—is based upon 38 U.S.C. 5109A(a), which provides that a VA decision based on clear and unmistakable error "shall be reversed or revised." As the court of appeals explained (Pet. App. 21-22), "[t]he call for reversal on account of clear and unmistakable error clearly suggests that the contemplated error is outcome determinative." The House and Senate Reports support this reading, since they approvingly discuss Veterans Court decisions holding that an error cannot be clear and unmistakable unless it is outcome-determinative. See H.R. Rep. No. 52, 105th Cong., 1st Sess. 2-3 (1997); S. Rep. No. 157, 105th Cong., 1st Sess. 3 (1997).

The second requirement—that the error be based upon the evidence of record at the time of the original decision—also finds support in the statutes and legislative history. First, as the Federal Circuit observed in a case on which the en banc court relied (Pet. App. 23-24), it is difficult to see how an error in a prior decision can be clear and unmistakable "[i]f additional evidence is needed to discern [the] error." *Pierce* v. *Principi*, 240 F.3d 1348, 1353 (Fed. Cir. 2001). Second, because the other statutory basis for reopening a VA decision is the discovery of "new and material evidence" (38 U.S.C. 5108), it is logical to believe, as the Federal Circuit observed in the same case, that the evidence that can be relied upon in a challenge based on clear and unmistakable error is "limited to evidence that was of record at the time the decision was made." *Pierce*, 240 F.3d at 1353. Third, in a case called *Russell* v. *Principi*, 3 Vet. App. 310 (1992) (en banc), the Veterans Court held that a claim of clear and unmistakable error must be based upon the record that existed at the time of the original decision (Pet. App. 23), and although the House and

Senate Reports "do not expressly discuss *Russell*'s holding with respect to the evidence that can be considered," they "do discuss *Russell* as setting forth the current state of the law which was to be codified by § 5109A." *Pierce*, 240 F.3d at 1353. Fourth, as the en banc court of appeals observed (Pet. App. 24), the House Report states that the "clear and unmistakable error" provision "addresses errors similar to the kinds which are grounds for reopening Social Security claims," and those claims "may be reopened at any time to correct an error which appears on the face of the evidence used when making the prior decision." H.R. Rep. No. 52, *supra*, at 3.

The court of appeals held that the requirement that a clear and unmistakable error be outcome-determinative and based on the existing record makes it "impossible for a breach of the duty to assist to form the basis for a ['clear and unmistakable error'] claim." Pet. App. 25. That holding was correct, because a breach of the duty to assist "necessarily implicates evidence that was not before the RO at the time of the original decision" (*id.* at 26) and "it cannot be said that an incomplete record is also an incorrect record" (*id.* at 25 (citation omitted)).

3. The en banc dissent argued (Pet. App. 33-50) that claimants seeking benefits before the VA have a property interest sufficient to invoke the protection of the Fifth Amendment's Due Process Clause, and that, where a breach of the duty to assist results in the denial of benefits, application of the rule of finality is a denial of due process. This Court has never held that claimants have a property interest in the benefits they are seeking from a government agency. See *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985). And even if they do, the en banc majority cor-

rectly held (Pet. App. 15 n.9) that the system for adjudicating veterans-benefits claims—including its two statutory exceptions to finality—satisfies the requirements of due process. That system affords the claimant the right to a hearing, the right to assert a breach of the duty to assist, and the right to appeal an adverse decision to the Veterans Court. See *ibid.* As the en banc court observed (*id.* at 16 n.9), "the possibility that an error may occur during the claim adjudication process is not a reason to hold the process in violation of the Due Process Clause and therefore vitiate the rule of finality." *Ibid.*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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